APPENDIX A

In the COURT OF APPEALS OF GEORGIA
WHOLE COURT

No. A00A0120.

TIME WARNER ENTERTAINMENT CO., ET AL.

v.

SIX FLAGS OVER GEORGIA, L.L.C. ET AL.

[Decided March 29, 2002]

ELLINGTON, Judge.

This is the second appearance of this case before this Court. On July 13, 2000, we affirmed the jury's award of compensatory and punitive damages to appellees Six Flags Over Georgia, L.L.C. ("Flags") and Six Flags Fund, Ltd., L.P. ("Fund"). *Time Warner Entertainment v. Six Flags Over Georgia*, 245 Ga. App. 334 (537 SE2d 397) (2000) ("Time Warner").[1] On January 18, 2001, the Supreme

---

[1] "This appeal is from a jury verdict in favor of a limited partnership and its sole limited partner against the general partner which from 1991 through 1998 operated the partnership's business investment, the Six Flags Over Georgia theme park. Appellee [Flags] is the limited partnership which owns the park. Appellee [Fund] is the partnership's sole limited partner and is comprised of individual investors. Although appellant Six Flags Over Georgia, Inc. ("SFOG") was the named general partner corporate entity responsible for operating the park, appellees alleged that Time Warner Entertainment Company, L.P. ("TWE"), acting through and in concert with its subsidiaries SFOG, Six Flags Entertainment Corporation ("SFEC"),

Court of Georgia denied the petition for a writ of certiorari filed by appellants Time Warner Entertainment Company, L.P. ("TWE") and its subsidiaries Six Flags Over Georgia ("SFOG"), Six Flags Entertainment Corporation ("SFEC"), and Six Flags Theme Parks, Inc. ("SFTP"). *Time Warner*, 2001 Ga. LEXIS 98 (Ga. Jan. 18, 2001). However, on October 1, 2001, the United States Supreme Court granted certiorari, vacated our opinion, and remanded the case to us for further consideration in light of an opinion it issued on May 14, 2001, *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (121 SC 1678, 149 LE2d 674) (2001) ("*Leatherman*"). *Time Warner*, ___ U.S. ___ (122 SC 24, 151 LE2d 1) (2001). Upon remand, we re-docketed this case and gave the parties an opportunity to brief and to orally argue the relevant issues.

1. *Leatherman* pertains only to our analysis of whether the award of punitive damages in this case was excessive. We addressed whether the award of punitive damages was excessive in Division 6 (c) of our original opinion. *Time Warner*, 245 Ga. App. at 356-357 (6) (c). Therefore, with the exception of Division (6) (c), we hereby reinstate our original opinion, *Time Warner*, 245 Ga. App. at 334-356.

---

and Six Flags Theme Parks, Inc. ("SFTP"), assumed the role of general partner and directed the activities of the partnership. The complaint alleged, in essence, that the general partner damaged the appellees by preferring its own financial interest over that of the partnership and of the limited partner. The jury returned a verdict in favor of the appellees, awarding a total of $197,296,000 in compensatory damages and $257,000,000 in punitive damages." (Footnotes omitted.) *Time Warner*, 245 Ga. App. at 334.

2. *Review of Allegedly Excessive Punitive Damages Awards.*

(a) *The Standard of Review.*

(i) *Federal Constitutional Excessiveness Claims. Leatherman* requires state and federal appellate courts to review de novo claims that punitive damages awards are grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Leatherman*, 532 U.S. at 433-434. However, "[i]f no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court's 'determination [on the excessiveness issue] under an abuse of discretion standard.'" Id. at 433, citing *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (109 SC 2909, 106 LE2d 219) (1989); see also *Foster v. Time Warner Entertainment Co., L.P.*, 250 F.3d 1189, 1194 n.3 (8th Cir. 2001) ("Time Warner has not argued that the punitive damages award violated its right to due process which would require a de novo review of the denial of its motion [for new trial or remittitur]" under *Leatherman*.) Further, if the federal constitutional claim is not raised in the court below, such arguments on appeal are "unavailing." *Leatherman*, 532 U.S. at 433 n.7.

Because *Leatherman* applies only to excessive punitive damages claims raised under the federal constitution's due process clause, it does not reach excessiveness claims raised under state and federal common law. Thus, state and federal appellate courts remain free to review common law excessiveness claims under an abuse of discretion standard. See id.; *Foster*, 250 F3d at 1194; *Stroud v. Lints*, 760 NE2d 1176, 1180 (I) (Ind. Ct. App. 2002) (following the U.S. Supreme Court's remand for reconsideration in light of *Leatherman*, the Indiana Court of Appeals concluded that since no federal constitutional claim was raised, it

could review the common law excessiveness claim under an abuse of discretion standard.)

As one scholar quipped, judicial review of excessive punitive damages awards "now comes in both common-law and constitutional flavors." Murphy, *Punitive Damages, Explanatory Verdicts, and the Hard Look*, 76 Wash. L. Rev. 995, 1014 (Oct. 2001). Since *Leatherman*, many state and federal courts have recognized this federal due process/common law analytical split. For example, in July 2001, the Eleventh Circuit reviewed an award of both compensatory and punitive damages in a diversity action under an abuse of discretion standard. *Middlebrooks v. Hillcrest Foods*, 256 F3d 1241, 1249 (IV) (11th Cir. 2001). Applying Georgia law to the common law excessiveness claim, the Eleventh Circuit noted that de novo review under *Leatherman* was not required because the appellant failed to argue that the punitive damages award violated its constitutional rights. Id. at 1249 n. 5. Although some state appellate courts have embraced *Leatherman*'s de novo standard of review and applied it to all excessive punitive damages claims, e.g. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 432 Utah Adv.Rep.44 (2001 Utah LEXIS 170; Oct. 10, 2001), other jurisdictions have declined to extend the standard's application beyond its federal due process bounds, e.g. *Trinity Evangelical Lutheran Church v. Towers Ins. Co.*, ___ Wisc. App. ___ (2002 Wisc. App. LEXIS 129; Jan. 30, 2002): *Stroud v. Lints*, 760 NE2d 1176 (Ind. Ct. App. 2002); *State Compensation Ins. Fund v. WPS, Inc.*, ___ Cal. App. ___ (2001 Cal. App. LEXIS 1410; Oct. 22, 2001). And at least one state appellate court has flatly rejected the *Leatherman* de novo standard of review as "an appellate procedural option for the federal courts." (Citation omitted.) *Seitzinger v. Trans-Lux Corp.*, ___ N.M. App. ___ (IV) (A) (2001 N.M. App. LEXIS 116; Nov. 30, 2001; cert

granted, 2002 N.M. LEXIS 20, Jan. 15 2002). The Supreme Court of Georgia has yet to enter this fray, so we proceed with caution.

In *Kent v. A.O. White, Jr., Consulting Engineers, P.C.*, ___ Ga.App. ___ (2002 Ga. LEXIS 111; Case No. A01A-0756, decided Jan. 29, 2002), a panel of this Court assumed that the Georgia Supreme Court "sub silentio" adopted *Leatherman* with respect to all excessive punitive damages awards claims by virtue of an order remanding *Kent* to this Court. We are now convinced, however, that the remand order had no such implications. The Georgia Supreme Court's remand order in that case, like the U.S. Supreme Court's remand order in this case, was a mandate to reconsider our opinion "in light of" *Leatherman*. 2001 Ga. LEXIS 929; Nov. 30, 2001. The U.S. Supreme Court has recognized that such a "grant-vacate-remand" order ("GVR") is a deferential method of sending a case back to a lower tribunal so that it may reconsider its decision in light of an intervening legal event. See *Lawrence v. Chater*, 516 U.S. 163, 166-169 (116 SC 604, 133 LE2d 545) (1996); see also *Hoover v. Kiowah Tribe*, 986 P.2d 516, 519 (Okla. 1999) (Wilson, J., dissenting). As Justice Scalia explained, "we left it to the state court to decide the effect of the intervening event, rather than follow our usual practice of deciding that question for ourselves." *Lawrence v. Chater*, 516 U.S. at 179 (Scalia, J. dissenting.) Also, the Georgia Supreme Court, in *Hospital Auth. of Gwinnett County v. Jones*, 261 Ga. 613, 616-617 (409 SE2d 501) (1991), a punitive damages case that was "GVR'd" by the U.S. Supreme Court in light of new case law, distinguished the intervening case law and affirmed and reinstated its previous decision. Implicitly then, if a higher court remands a case to a lower court to decide an issue for itself, it logically follows that the higher court did not decide the issue pending before it. Therefore, to the extent

Kent holds that the Georgia Supreme Court, by virtue of its remand order, adopted the *Leatherman* standard of review with respect to all excessive punitive damage award claims, it is hereby overruled.

(ii) *State Common Law Excessiveness Claims*. Because *Leatherman* applies only to excessiveness claims raised under the due process clause of the federal constitution, precedent dictates that we must continue to review state common law claims under an abuse of discretion standard. *Hospital Auth. of Gwinnett County v. Jones*, 259 Ga. 759, 760-766 (1)-(5) (386 SE2d 120) (1989), vacated by 499 U.S. 914 (111 SC 1298, 113 LE2d 234) (1991), reinstated by 261 Ga. 613, 616-617 (409 SE2d 501) (1991); see also *Scott v. Battle*, 249 Ga. App. 618, 621 (3) (548 SE2d 124) (2001). The Georgia Supreme Court explained in *Hospital Auth. of Gwinnett County v. Jones* that the right to punitive damages derives from the common law. 259 Ga. at 764 (5) (b); 261 Ga. at 616-617(2). This Court has also held that the right to punitive damages is "as old as the right of trial by jury itself," is a "well established principle of the common law," and "is not, as many seem to suppose, an innovation upon the rules of the common law." (Citations omitted.) *K-Mart Corp. v. Hackett*, 237 Ga. App. 127, 132-133(2) (514 SE2d 884) (1999). Our deferential standard of review in punitive damages cases is, in fact, well over two centuries old and derives from the aptly named English common law case, *Huckle v. Money*, 2 Wills. 205, 95 Eng. Rep. 768 (K. B. 1763). See *Seaboard Air-Line Ry. v. Miller*, 5 Ga. App. 402, 405 (63 SE 299) (1908). The King's Bench in *Huckle* opined that "it is very dangerous for the judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a court to grant a new trial for excessive damages." See *Seaboard*, 5 Ga. App. at 405,

quoting *Huckle*. This principle underlies OCGA § 51-12-12 (a), pertaining to court interference with damages awards generally: "The question of damages is ordinarily one for the jury; and the court should not interfere with the jury's verdict unless the damages awarded by the jury are clearly so inadequate or so excessive as to be inconsistent with the preponderance of the evidence in the case."

Applying this principle to appellate courts, the Georgia Supreme Court explained that reviewing courts lack

> the broad discretionary powers invested in trial courts to set aside verdicts, and where the trial court before whom the witnesses appeared had the opportunity of personally observing the witnesses has approved the verdict, this court is without power to interfere unless it is clear from the record that the verdict of the jury was prejudiced or biased or was procured by corrupt means.

(Citation and punctuation omitted.) *Smith v. Milliken*, 247 Ga. 369, 372(3) (276 SE2d 35) (1981). The reasoning implicit in this rule is that an excessive or inadequate verdict constitutes a mistake of fact rather than of law. *Moody v. Dykes*, 269 Ga. 217, 221-222(6) (496 SE2d 907) (1998), citing *Southeastern Security Ins. Co. v. Hotle*, 222 Ga. App. 161, 165(2) (473 SE2d 256) (1996). Under our system of jurisprudence, the resolution of factual issues is usually for the jury. Id.; (Citation omitted.) *McClure v. Gower*, 259 Ga. 678, 684 (385 SE2d 7) (1989) ("the amount of the punitive damages award is 'exclusively a question for the jury to determine.'") The U.S. Supreme Court, however, broke with common law tradition (and avoided the application of the Seventh Amendment[2]) by

---

[2] "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, *and*

characterizing a jury's decision to award a certain amount of punitive damages as a question of law.[3] *Leatherman*, 532 U.S. at 437. Some scholars consider this a "dangerous development," one that moves "the locus of decision-making away from juries and trial judges and toward the appellate courts." (Footnote omitted.) Dorsaneo, "Reexamining the Right to Trial by Jury," 54 S.M.U. L. Rev. 1695, 1733 (2001). In fact, in *Todd v. Roadway Express, Inc.*, 178 F. Supp. 2d 1244 (M.D. Ala. 2001), the defendant argued that since the punitive damages inquiry is no longer a factual one, the plaintiff is no longer entitled to a jury trial on punitive damages. The district court refused to extend *Leatherman* to this extreme. Id.

Because the Georgia Supreme Court has not embraced the idea that an award of punitive damages is a question of law, we believe we are bound by precedent to defer to the jury's factual decision-making process and to apply an abuse of discretion standard when evaluating whether an award is excessive under the common law. See e.g., *Hospital Auth. of Gwinnett County v. Jones*, 259 Ga. at 766(5); *Scott v. Battle*, 249 Ga. App. at 621(3); *Southeastern Sec. Ins. Co v. Hotle*, 222 Ga. App. at 164(1).

---

no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." (Emphasis supplied.) U.S. Const., Amend. VII.

[3] Whether the jury's award of punitive damages is really the result of a factual inquiry is a subject of some dispute. Certainly, as Justice Ginsburg points out in her dissent, punitive damages "derive their meaning from a set of underlying facts as determined by a jury." *Leatherman*, 532 U.S. at 446 (Ginsburg, J., dissenting.) Nevertheless, what a jury does with those facts is a kind of case-by-case policymaking that involves consideration of broader issues, like deterrence and retribution. See Murphy, *Punitive Damages, Explanatory Verdicts, and the Hard Look*, 76 Wash. L. Rev. 996, 1011-1012 (Oct. 2001).

(b) *Criteria for Evaluating "Excessiveness" of Punitive Damages Awards*

When an appellant has properly raised a federal due process claim, the reviewing court must apply the three "guideposts"[4] set out in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (116 SC 1589, 134 LE2d 809) (1996), in its de novo review of whether the award of punitive damages is grossly excessive. *Leatherman*, 532 U.S. at 440. When an appellant has not raised a federal constitutional due process claim, however, we apply state common law criteria for determining whether a punitive damages award is excessive. See id.

The Georgia Supreme Court has held that an award of punitive damages under OCGA § 51-12-5.1 is to deter the repetition of reprehensible conduct by the defendant or others. (Citation omitted.) *Hospital Auth. of Gwinnett County v. Jones*, 261 Ga. at 614 n. 2 (1), 614-615(1). "Because deterrence is based on factors other than the actual harm caused, we rejected the notion that punitive damages must necessarily bear some relationship[5] to the actual damages awarded by the jury." Id. at 614(1). Instead, the appellate courts look to see whether the award "shock[s] the judicial conscience." (Citation and

---

[4] These guideposts are: (1) the degree or reprehensibility of the defendant's misconduct, (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Leatherman*, 532 U.S. at 440.

[5] "The concept of proportionality as a *legal* limitation on the amount of punitive damages applies, in Georgia, only when damages are given to compensate for wounded feelings." (Emphasis original.) *Hospital Auth. of Gwinnett County v. Jones*, 259 Ga. at 762 (2). See OCGA § 51-12-5.

punctuation omitted.) *Wilson Welding Svc. v. Partee*, 234 Ga. App. 619, 620 (507 SE2d 168) (1998). This test, which has been applied to damages awards based on jury verdicts generally, has a very long history and has been more fully elaborated thus:

> Before the verdict will be set aside on the ground that it is excessive, where there is no direct proof of prejudice or bias, the amount thereof, when considered in connection with all the facts, must shock the moral sense, appear exorbitant, flagrantly outrageous, and extravagant. It must carry its death warrant upon its face. Although a verdict may be large and generous, where the evidence abundantly authorized a finding for the plaintiff, this court does not feel authorized under the law to set the verdict aside on the sole ground that it is excessive, there being nothing in the record to indicate prejudice or bias on the part of the jury, and the verdict having been approved by the trial judge.

(Citations and punctuation omitted.) *Western & A. R. R. v. Burnett*, 79 Ga. App. 530, 542-543 (7) (54 SE2d 357) (1949). Of course, an appellate court may look to the ratio of compensatory to punitive damages for some evidence that the punitive damages award is infected by bias or prejudice. See *Hospital Auth. of Gwinnett County v. Jones*, 261 Ga. at 614(1); *Southeastern Security Ins. Co. v. Hotle*, 222 Ga. App. at 164(1)(e); *Oglethorpe Power Co. v. Sheriff*, 210 Ga. App. 299, 301-302(4)(c) (436 SE2d 14) (1993). We believe the *Gore* guideposts might also be helpful in determining whether an award of punitive damages is infected by bias or prejudice.[6]

---

[6] However, we note that many scholars have found *Gore* as imperfect an attempt to evaluate punitive damages awards as those

3. *The Award of Punitive Damages Against Appellants*

(a) *Appellants Abandoned Their Federal Due Process Excessiveness Claim*

In their enumerations of error, appellants failed to assert that the award of punitive damages violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[7] Instead, they simply asserted the award was "excessive." In two sentences at the very end of their appellate brief, however, appellants noted that "punitive damages also violates the Due Process Clauses of the Georgia[8] and United States Constitutions," citing *Gore*. Appellants did not argue that the award was "grossly excessive"; rather, it alleged the appellees' injury was "purely economic in nature" and "evinced no indifference to or reckless disregard for the health and safety of others." Pretermitting whether this adequately enumerated an "excessiveness" claim under the federal due process clause, we considered the claim of error abandoned because appellants failed to cite to any relevant facts, give record citations, or present any legal analysis supporting that assertion. Court of Appeals Rule 27(c)(2), (3). An

---

fashioned by state courts. See "Developments in the Law," 113 Harv. L. Rev. 1783, 1792-1795 (2000). For example, the *Gore* guideposts combine a number of variables that are not specifically weighted. Consequently, these "variables make it difficult for a court to find precedential value in a prior decision, because it is nearly impossible to determine how an earlier court valued any one of them." (Footnote omitted.) Leading Case, 115 Harv. L. Rev. 356, 362 (2001).

[7] The issue was raised in the trial court in appellants' amended motion for j.n.o.v. or, in the alternative, new trial.

[8] We also find that appellants abandoned any claim of error under the due process clause of the Georgia Constitution. Had that claim been preserved, however, our analysis would be quite similar to that applied to common law excessiveness claims. See *Hospital Auth. of Gwinnett County v. Jones*, 259 Ga. at 763-766 (5); 261 Ga. at 615-617 (2).

assertion of error followed by a case citation is *not* legal argument. As we have explained, legal analysis "is, at a minimum, a discussion of the appropriate law as applied to the relevant facts." *Dixon v. Metropolitan Atlanta Rapid Transit Auth.*, 242 Ga. App. 262, 266(4) (529 SE2d 398) (2000). Because appellants abandoned any error with respect to a federal constitutional excessiveness claim, we are not required to conduct a de novo review of the punitive damages award or to apply the *Gore* guideposts. *Leatherman*, 532 U.S. at 433. Consequently, we reinstate Division (6)(c) of our original opinion, *Time Warner*, 245 Ga. App. at 356(6)(c) (2000), finding no abuse of discretion in the amount of the punitive damages award under Georgia common law.

(b) We recognize, however, that the Georgia Supreme Court may choose to apply *Leatherman* and *Gore* to all excessive punitive damages claims or to the claim presented in this case. Therefore, as a matter of judicial economy, we also review the punitive damages award de novo and apply the *Gore* guideposts.

(i) *Reprehensibility*. We begin our analysis by examining the degree of reprehensibility of appellants' conduct in this case. In examining the degree of reprehensibility of a defendant's conduct, the Supreme Court in *Gore* outlined a number of "aggravating factors," including whether the harm was more than "purely economic in nature," and whether the defendant's behavior "evinced indifference to or reckless disregard for the health and safety of others." *Gore*, 517 U.S. at 576. Here, although the harm to Flags and Fund was primarily economic, it was caused by conduct we find especially reprehensible. Appellants' intentional breach of its fiduciary duty revealed a callous indifference to the

financial well-being of its limited partners and their individual investors.

After closely scrutinizing over 80 volumes of record and transcript during the first appeal, we found that the evidence adduced supported the jury's conclusion that appellants acted in concert to breach SFOG's fiduciary duty to its business partners. Six-and-a-half pages of our published opinion are dedicated to describing appellants' scheme to devalue their partners' investment for their own benefit. *Time Warner*, 245 Ga. App. at 335-341. We found this evidence clearly and convincingly supported an award of punitive damages under OCGA § 51-12-5.1(b) because the evidence showed that "the appellants withheld vital business information from Fund and Flags, undertook to compete with them, took money belonging to them, and carried out a plan to depress the value of their investment, the Six Flags Over Georgia Park." Id. at 356 (6)(a). Moreover, the jury found a specific intent to cause harm, id. at 334-335 n.3, 356 (6)(b), which allowed it to award damages in excess of the $250,000.00 cap. OCGA § 51-12-5.1(f), (g).

Appellants' conduct toward its partners and those who invested in the limited partnership was part of a premeditated plan surreptitiously executed over a period of years. Appellants' conduct was deceitful, self-serving, and financially damaging. More importantly, however, appellants' conduct was a breach of fiduciary duty, a violation of a confidential relationship of trust requiring the utmost in good faith. Even though Flags and Fund were, as appellants asserted at oral argument, controlled by "sophisticated business people," they were nevertheless entitled to rely on their general partner. Appellants' conduct was, in short, the kind of behavior we find "deserving of reproof, rebuke, or censure; blameworthy" —

the very definition of "reprehensible." The Random House Webster's Unabridged Dictionary, 2nd Ed., p.1634. A California court, which recently considered a comparable issue upon remand under *Leatherman*, held: "Trickery and deceit are reprehensible wrongs, especially when done intentionally through affirmative acts of misconduct." (Citation and punctuation omitted.) *Simon v. San Paolo Holding Co.*, ___ Ca.App.2d Dist. ___ (2001 Cal. App. LEXIS 2023; Nov. 7, 2001). We agree.

(ii) *Ratio*. In *Gore*, although the U.S. Supreme Court held that the ratio of compensatory to punitive damages[9] is a factor to consider in determining whether the punitive damages award is excessive, it refused to draw a bright line. The court explained that "[w]e need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that a general concern of reasonableness properly enters into the constitutional calculus." (Citations and punctuation omitted.) *Gore*, 517 U.S. at 582-583 (III). It is not enough, as some have suggested, "to do the math"; we must also do the reasoning.

In this case, the ratio of compensatory to punitive damages is 1-to-1.3. We see no "shocking disparity" inherent in this figure. Cf. *Gore*, 517 U.S. at 581 n. 34, 582-583 (1:500 ratio reversed). Nor does it appear to approach that

---

[9] Appellants suggested that because the award of punitive damages in this case is currently the largest in Georgia history, that it is excessive. An award of punitive damages, however, should not be viewed in the abstract or compared with awards from other cases. The punitive damages award must be viewed in its unique context, in light of the facts of the case and with reference to the actual damages awarded and the potential harm that could have resulted from the defendant's conduct. See *Gore*, 517 U.S. at 580-583.

fuzzy line suggesting the bounds of "constitutional impropriety." Id. at 581, citing *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (111 SC 1032, 113 LE2d 1) (1991) (1:4 ratio upheld); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 451, 462 (III) (113 SC 2711, 125 LE2d 366) (1993) (1:10 ratio upheld). More importantly, however, given the amount of intentional economic damage inflicted by the appellants, corporate entities with collective assets measured in billions of dollars, we believe the award of punitive damages was reasonably calculated to punish them and to deter such conduct in the future. See *Simon v. San Paolo Holding Co.*, ___ Ca. App. 2d Dist. ___ (2001 Cal. App. LEXIS 2023, 2040-2043; Nov. 7, 2001).

(iii) *Sanctions for Comparable Misconduct*. Georgia law authorizes double and treble damages for a variety of unfair and deceptive business practices, certain securities violations, and generally corrupt corporate behavior.[10] Statutory multiple damages awards are intended to deter those who might engage in deceptive practices when the risk of getting caught would otherwise be an acceptable cost of doing business. See, e.g., *Zeeman v. Black*, 156 Ga. App. 82, 273 SE2d 910 (1980) (private right of action under OCGA § 10-1-399 furthers policy of protecting the citizenry from unfair business practices). The award of punitive damages in this case is well within the range of comparable multiple damages penalties for dishonest business conduct. The award speaks to deterrence and appears in all respects reasonably calculated to further that

---

[10] See e.g., OCGA § 10-1-399 (c) (Fair Business Practices Act; treble damages for intentional violations); OCGA § 16-14-6 (c) (RICO; treble damages for injury under section); OCGA § 10-1-763 (b) (double damages for wilful misappropriation of trade secrets); OCGA § 10-5-14 (h) (2) (treble damages for certain securities violations).

end. Given existing Georgia statutes for comparable corporate misbehavior, appellants received fair notice not only of the kind of conduct that would subject them to punishment, but also of the severity of the penalty that might be imposed. Cf. *Gore*, 517 U.S. at 585.

Applying a de novo standard of review and weighing the *Gore* guideposts, we find that the award of punitive damages under these circumstances does not violate appellants' federal due process rights.

Judgment affirmed and reinstated on remand. Blackburn, C. J., Pope, P. J., Smith, P. J., Ruffin, Eldridge, Barnes, Miller, Phipps and Mikell, JJ., concur. Andrews, P. J. and Johnson, P. J., recused.

APPENDIX B

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

Case No. S02C1177

TIME WARNER ENTERTAINMENT COMPANY, L.P., ET AL.

v.

SIX FLAGS OVER GEORGIA, LLC, ET AL.

[Sept. 16, 2002]

COURT OF APPEALS CASE NO. A00A0120

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur, except Fletcher, C.J., and Hunstein, J., who dissent.

Sherie M. Welch, Clerk

APPENDIX C

SUPREME COURT OF GEORGIA
ATLANTA

Case No. S02C1177

TIME WARNER ENTERTAINMENT COMPANY, L.P., ET AL.

v.

SIX FLAGS OVER GEORGIA, LLC, ET AL.

[Oct. 11, 2002]

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Fletcher, C.J., and Hunstein, J., who dissent.

Supreme Court of the State of Georgia

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sherie M. Welch, Clerk

APPENDIX D

COURT OF APPEALS
OF THE STATE OF GEORGIA

No. A00A0120

TIME WARNER ENTERTAINMENT COMPANY, LP, ET AL.
v.
SIX FLAGS OVER GEORGIA, LLC, ET AL.

[Nov. 6, 2002]

The Court of Appeals hereby passes the following order:

On September 16, 2002, the Supreme Court of Georgia denied the Application for Certiorari filed by the appellants. On October 11, 2002, the Supreme Court of Georgia denied appellants' Motion for Reconsideration. This Court received the Supreme Court's remittitur on November 1, 2002, and on that same day, this Court received a "Notice of Consent and Joint Motion to Stay Remittitur" and a "Consent to Stay Remittitur and Stipulations to Maintain Status Quo".

It is the general policy of this Court not to stay remittiturs on applications for Certiorari to the United States Supreme Court. The parties are free to file a Motion to Stay the Remittitur in the United States Supreme Court, or a Motion to Recall the Remittitur in the United States Supreme Court, should this Court have previously issued its remittitur. In fact, the parties filed such motions in the United States Supreme Court in an earlier Application for

Certiorari to that Court. The United States Supreme Court ordered this Court to Stay the Remittitur, which had already issued, which this Court construed to be an order to recall the remittitur, and this Court did recall its remittitur.

This Court sees no reason to deviate from its general practice and upon consideration of the Motions to Stay Remittitur, the same are hereby DENIED. The parties are free to file such motions in the United States Supreme Court as they deem appropriate to stay or recall the remittitur.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk,

/s/ William L. Martin, III

APPENDIX E

IN THE COURT OF APPEALS OF GEORGIA
THIRD DIVISION

No. A00A0120

TIME WARNER ENTERTAINMENT COMPANY, L.P. ET AL.

v.

SIX FLAGS OVER GEORGIA, L.L.C. ET AL.

[Decided July 13, 2000]

Before: ANDREWS, PJ., RUFFIN, and ELLINGTON, JJ.

ELLINGTON, Judge.

This appeal is from a jury verdict in favor of a limited partnership and its sole limited partner against the general partner which from 1991 through 1998 operated the partnership's business investment, the Six Flags Over Georgia theme park. Appellee Six Flags Over Georgia, L.L.C. ("Flags") is the limited partnership which owns the park. Appellee Six Flags Fund, Ltd., L.P. ("Fund") is the partnership's sole limited partner and is comprised of individual investors.[1] Although appellant Six Flags Over Georgia, Inc. ("SFOG") was the named general partner corporate entity responsible for operating the park,

---

[1] Appellee Six Flags Claims Trust is not a limited partner and was awarded no damages. It was created solely to fund the litigation and handle any proceeds of the litigation.

appellees alleged that Time Warner Entertainment Company, L.P. ("TWE"), acting through and in concert with its subsidiaries SFOG, Six Flags Entertainment Corporation ("SFEC"), and Six Flags Theme Parks, Inc. ("SFTP"), assumed the role of general partner and directed the activities of the partnership. The complaint[2] alleged, in essence, that the general partner damaged the appellees by preferring its own financial interest over that of the partnership and of the limited partner. The jury returned a verdict in favor of the appellees, awarding a total of $197,296,000 in compensatory damages and $257,000,000 in punitive damages.[3] Appellants contend they are entitled to a new trial because (1) the trial court should have directed a verdict in favor of certain "non-partner defendants"; (2) the court should have directed a verdict in appellants' favor on appellees' "capital improvements" claim; (3) the evidence of breach of fiduciary duty was insufficient to support the jury's verdict; (4) the court erred in admitting or excluding certain evidence; (5) the court impermissibly impugned defense witnesses in the jury's

---

[2] The complaint set forth counts for breach of fiduciary duty, conversion, fraud, breach of contract, conspiracy to breach contractual obligations, and for an accounting. Of the claims actually submitted to it (breach of fiduciary duty, conversion, and breach of contract), the jury found in favor of appellees on the breach of fiduciary duty claim only.

[3] The jury found that each of the appellants breached the fiduciary duty owed Fund and awarded it $149,175,000 in compensatory damages. The jury also found that each of the appellants breached the fiduciary duty owed Flags and awarded it $48,121,000 in compensatory damages. The jury, finding that each of the appellants acted with a specific intent to harm, awarded punitive damages as follows: from TWE, $183,750,000 to Fund and $61,250,000 to Flags; from SFEC, $6,000,000 to Fund and $2,000,000 to Flags; from SFTP, $2,250,000 to Fund and $750,000 to Flags; from SFOG, $750,000 to Fund and $250,000 to Flags.

presence; (6) the court erred in giving certain jury charges; (7) compensatory damages were either speculative or excessive; and, (8) punitive damages were either unwarranted or excessive. Finding no reversible error, we affirm.

Viewed in the light most favorable to support the jury's verdict, the record reveals the following relevant facts: Flags, the partnership which owns the Six Flags Over Georgia theme park, has existed since 1967. The park, much like its sister park in Texas, was developed as a limited partnership comprised of a limited partner investor and a general partner park operator. The rights and responsibilities of the partners were set out in a written agreement which was amended in 1973. The agreement provided that the general partner had "exclusive control of the management of the business and affairs of the limited partnership" and would receive, among other compensation, 70 percent of the park's net cash flow. The partnership agreement also required the general partner to make certain "minimum" capital improvements each year. The 30-year partnership agreement expired on December 31, 1997. When the agreement ended, ownership of the park reverted wholly to the limited partner, Fund, which could then elect to sell the park or to entertain bids from prospective general partners who wished to enter a new partnership agreement. Appellees' principal witness, Avram Salkin, a Fund investor and signatory on the partnership agreement, has acted as Fund's representative for the last 30 years.

In 1990, TWE executives investigated acquiring all seven of the Six Flags theme parks and marketing them as "a national brand." In 1990, TWE bought nineteen percent, with an option to buy an additional thirty percent, of the stock of Six Flags Corporation (SFTP's predecessor), the company which owned five of the Six Flags theme

parks and controlled the Georgia and Texas parks' general partner corporations. TWE executive Bob Pittman, the "architect" of the Six Flags deal, pitched the idea of acquiring Six Flags Corporation to the Time Warner, Inc., Board of Directors in July 1991. On December 26, 1991, TWE exercised its option and bought a controlling interest in SFTP, which owned SFOG, the named general partner of the Georgia park. Pittman, who was president of Time Warner Enterprises, a division of TWE, then became chairman of the board and CEO of SFEC, the TWE subsidiary which owned SFTP. He held those positions until 1995 when he left TWE for America Online. Pittman admitted that "as president of Time Warner Enterprises or Six Flags Entertainment, we were making decisions about the Georgia Park."

As early as February 19, 1991, months before TWE acquired controlling interest in the parks, Pittman began negotiating with the Coca-Cola Company to sell it the exclusive right to market Coca-Cola products at all seven Six Flags theme parks. A confidential agreement dated November 27, 1991, made the Coca-Cola deal contingent upon TWE acquiring a controlling interest in SFTP. The agreement was signed by Pittman as CEO of Time Warner Enterprises and by a Coca-Cola executive. In exchange for the promised sale of these rights, TWE received a one-time $20 million "sponsorship fee" or "marketing advance." On December 26, 1991, TWE used these funds and funds from other sources to exercise its option and buy the additional 30 percent of SFTP stock and controlling interest of the company. On that same date, Coca-Cola and SFEC executed a final marketing agreement. Salkin was not informed that this Flags asset had been sold until 1995, and when he asked to see the Coca-Cola agreement, he was told it was confidential. Flags never received its $2.8 million share of the $20 million fee.

In April 1992, Salkin was invited to meet with Pittman and other TWE and SFEC executives. Pittman immediately wanted to discuss buying out the Georgia theme park. Of course, Salkin could not simply negotiate a sale; he was required by his agreement with Fund investors to "shop" the park to the highest bidder when the partnership agreement expired. When TWE, Flags, and Fund representatives met again in October 1992, Pittman presented a 150 million-dollar plan for the Georgia park which included building a hotel and an island. According to Salkin, however, Pittman conditioned the plan upon "some type of a deal," and hinted that if Fund and Flags did not cooperate, TWE would build a competing park and would not make capital investments in new thrill rides for the Georgia park. Salkin said Pittman told him that TWE was "not interested in being in the business of managing assets for others."

A year after this meeting, Time Warner, Inc. executives contacted a real estate broker with Cushman & Wakefield's Atlanta office to discuss acquiring land in Georgia. Although the broker met with a Time Warner, Inc. executive, he was retained by SFTP to purchase land as a nominee and to keep the name of the actual buyer confidential. The broker's commissions were paid by SFTP. He was not authorized to discuss any of the land transactions with Salkin or representatives of Fund or Flags.

The broker acquired 13.7 acres of land immediately adjacent to the Georgia park for $1.8 million. On behalf of Time Warner, Inc., the closing papers were signed by Senior Vice President Paul McNicol. The purchase of this property effectively bounded the Six Flags theme park between the Time Warner, Inc. parcels, the Chattahoochee River, and Interstate 20, thus limiting the park's expansion

opportunities. The broker was also later told to find a 600-700 acre tract of land 40-60 miles from Atlanta and to refer to the project as the "Pennants Theme Park." On June 30, 1994, the broker went on a helicopter ride with Pittman and SFTP and SFOG executives to view land meeting the project criteria. The helicopter ride was paid for by Time Warner, Inc. and categorized as an expense for "development of [a] new park." Time Warner, Inc. authorized the broker to make offers on the land, which he did. Almost a year later, after negotiating potential sales and faxing counteroffers to Time Warner Inc.'s lawyers, the broker was told to cease his efforts.

During this time, TWE also studied the feasibility of developing a competing park. Stephen Ross, Bob Daly, and Terry Semel—executives with TWE's Warner Brothers division, who in April 1995 succeeded Bob Pittman as the primary decision makers for the general partner—hired Harrison Price Company to evaluate building a theme park within 100 miles of Atlanta. The evaluation was done using confidential business information from the Six Flags Over Georgia park. Although no competing theme park was ever built, TWE executives did draft a plan dated October 2, 1996, which outlined spending 12 million dollars on capital improvements for the proposed park every third year and five million dollars for each of the two years in between. From 1991 through 1996, TWE never caused during any one year $5 million to be spent on capital improvements at the Georgia Park, even though all capital expenditures would come from the park's surplus operating cash.

In late 1995 and early 1996, Salkin began the task of shopping the park by visiting competitors' theme parks to evaluate them as prospective bidders for general partner. According to Salkin, he learned that major capital invest-

ments, particularly in new thrill rides, was the key factor that drove attendance and profits at the parks. When Salkin toured the Georgia park in May 1996, he discovered that the park's operators had been asking the general partner to install an inverted roller coaster, "Batman the Ride," since 1992. Salkin, however, had been told by TWE executive Ross that the Georgia park would not get the coaster in 1996 because park management had agreed that the Olympics would adversely impact park attendance that year. The park operators told Salkin that, although they were concerned about the impact of the Olympics, this did not change their desire to add the Batman coaster to the park, and stated that they were trying on their own to find a way to market the park during the Olympics. Salkin also testified that Flags had been over-charged for the old but refurbished Viper roller coaster ride which had been installed in 1992. Further, there was evidence that the Georgia park had substantial "deferred maintenance" and needed between $7 and $10 million in basic repair. Salkin also discovered that TWE had been signing key park executives, including SFOG President John Bemet, to employment contracts with TWE that became effective when the partnership ended. Salkin testified that the contracts provided that the employee would not compete against TWE, would not disclose business information to anyone, including Fund and Flags representatives, and would not assist anyone in litigation against TWE.

On June 7, 1996, Salkin and his attorney wrote TWE and SFTP executives and informed them that, if they could not reach an agreement to install Batman the Ride in the Georgia park before the opening of the 1997 season, negotiations with TWE for the general partnership would be deferred. Ten days later, Salkin met with TWE executives Ross and Daly and discussed his grievances. On August 1, 1996, TWE agreed to install Batman the

Ride, to transfer land adjacent to the park to Flags, to stop signing park employees to TWE contracts, and to reserve to Fund and Flags any claims each might bring against TWE in future litigation. Consequently, later that month, TWE's Warner Brothers division was allowed to bid for the general partnership. According to Salkin, TWE pledged to build "rides, rides, rides," investing significant amounts in capital improvements, and promised that it was in the amusement park business "to stay." Because TWE made the best offer for the park, Fund selected it to continue as general partner. The parties estimate the present value of the new 30-year partnership agreement at between $286 million and $300 million. On March 19, 1997, the day after the new partnership agreement was executed, SFOG and SFTP sued Salkin and Fund, seeking to resolve those claims which Fund and Flags had previously reserved. The trial court, by consent order, realigned and added parties and this litigation ensued. Less than a year later, TWE sold all seven of the Six Flags theme parks to Premier Parks, Inc. as a "package deal" for $1.9 billion, resulting in earnings to TWE of approximately $453 million.

Appellees' contention was that TWE intended to buy the Georgia park outright and, if it could not, it planned to use its position as general partner to deliberately under-invest in the park to depress its value. According to appellees, TWE's plan was to deter prospective competing bidders and allow TWE to purchase the park or secure the general partnership at reduced cost at the end of 1997. And, because it was in TWE's financial interest to sell all seven of the Six Flags parks as a package, appellees contended TWE intended to get long-term control of both partnership parks.

To establish these claims, Fund and Flags adduced evidence explaining how amusement parks are typically invested in, valued, and sold. The evidence showed that amusement parks are sold (or management contracts are based) on a multiple of park earnings before interest, taxes, depreciation, and amortization ("EBITDA"). Capital investment in an amusement park, especially in major thrill rides, fuels EBITDA growth, which in turn increases the value of the park. Conversely, low or modest capital investment keeps amusement park earnings and growth flat and the park's value depressed.

Other evidence from TWE's own internal documents showed that once it got control of the Six Flags theme parks, it planned to spend considerably less on the Georgia park than on any of its wholly owned parks. For example, a September 1991 confidential memorandum revealed a plan to make "10 percent annual increases in spending at each of the owned parks and a consistent decline in spending at the partnership parks as their agreements with the company approach their expiration date." As TWE later demonstrated in a slide show presentation to its executives entitled "Six Flags Strategic Choices," the plan to lower capital expenditures was a choice, using their own word, to "milk" the park as part of an overall strategy to "eventually sell pieces or [the] whole business."

TWE documents also revealed that TWE did, in fact, invest considerably less in the Georgia Park as compared to the wholly owned parks. Evidence was produced that TWE consistently installed new thrill rides in its wholly owned parks, following a "major/minor plan" to make large capital investments in a major attraction every second or third year followed by a minor new attraction in the year or years in between. During TWE's 7-year tenure as general partner of the Georgia park, however, the only

thrill ride it voluntarily installed was 1992's Viper roller coaster, a 20-year-old traditional coaster which had been removed from the Chicago park to make room there for Batman the Ride. The Viper was considered a minor capital expenditure and a minor new attraction. Each of the owned parks, however, received major new rides every second or third year. And, by 1995, four out of the five wholly owned parks had received Batman the Ride, an inverted coaster, which significantly increased EBITDA at each of those parks. Salkin testified that, after Batman the Ride was installed in Georgia, the park's value increased by 40 percent and pushed its EBITDA to $28 million. Salkin further testified that if the Georgia park had gotten Batman the ride in 1995 and another major attraction in 1997, the park's EBITDA would have risen to approximately $40.7 million, giving it an estimated value in the $500 to $600 million dollar range.

In fact, there was evidence that Batman the Ride had been purchased specifically for the Georgia park's 1995 season, but it was diverted to TWE's wholly-owned St. Louis park because, according to notes from a July 12, 1995 meeting at Warner Brothers Studios between TWE and its business partners, "despite the quick return [on investment], putting an inverted coaster into the [Georgia] Park could increase the limited partner's leverage in negotiating with other potential strategic partners in 1998 and beyond." Consequently, TWE's installation of the coaster would be "subject to a deal with the limited partners." There was evidence that the Olympics were never a factor in TWE's decision to delay installation of the ride, and that installation of a major ride in the Texas partnership park was also delayed until a deal with TWE was reached.

In addition to evidence that TWE withheld capital expenditures on major attractions in the Georgia Park, evidence was also produced that it withheld or distorted requested financial information necessary for Flags and Fund to adequately assess the park's performance and value. In fact, Salkin testified that he stopped receiving detailed monthly financial reports when he started to shop the park in 1995. Salkin said he repeatedly requested data on the park's value and performance, the effect of coasters on EBITDA, the level of capital expenditures, and the park's projected future value and performance, but that he received only scant and incomplete information. Fund did not receive a 30-year projection showing, by TWE's own estimation, that the present value of the Georgia park was close to $600 million. There was evidence that TWE did not divulge this information because it wanted to induce Fund to choose from TWE's bid proposals an arrangement with a higher annual payment and a smaller percentage of profits. Without the information he requested, Salkin testified he could not adequately evaluate the proposals received from other bidders or from TWE. Moreover, there was evidence that the competing bidders, having only the information Salkin had, were induced to make conservative, and consequently losing, bids for the general partnership.

Appellees' expert, a management consultant in the theme park industry, testified about what a prospective bidder was warranted in investing in the Six Flags Over Georgia theme park. He opined that the park was "under-invested," "not keeping pace," and "suffering" compared to comparable parks. Further, in a time when Atlanta's population and economy were growing much faster than that of the other Six Flags cities, the Georgia Park should have been able to capture the market in 1997 and generate $100 million instead of the $87.8 million it brought in.

Using a conservative 10.7 multiple of EBITDA, the expert opined that the Georgia park, had it been properly managed and invested, would warrant an investment of about $442 million in 1998. Using the higher 13.6 multiple of EBITDA that TWE actually used in its sale of all seven Six Flags theme parks to Premier Parks in 1998, the warranted investment could have been as high as $560 million.

Appellees also presented evidence showing that TWE charged Flags for expenses that were not allowed under the partnership agreement. TWE charged over $4 million of its corporate expenses—for example, executive lunches at New York's Tavern on the Green and luxury automobiles for TWE executives—to the partnership. TWE also overcharged Flags for the Viper roller coaster by almost $1.4 million. Adding these damages to those attributed to the lost Coca-Cola fee, lost park income, and lost park value, appellees' damages expert estimated that Fund and Flags together suffered $239,363,642 in economic damages over the years appellants acted as general partner.

1. In three enumerations of error, Appellants argue the trial court should have directed a verdict or judgment notwithstanding the verdict with respect to certain defendants and claims. A directed verdict is appropriate "only if there is no conflict in the evidence as to any material issue and the evidence introduced, construed most favorably to the party opposing the motion, demands a particular verdict. OCGA § 9-11-50 (a)." *St. Paul Mercury Ins. Co. v. Meeks*, 270 Ga. 136, 137(1), 508 S.E.2d 646 (1998). The same standard also applies to our review of the trial court's decision to deny appellants a judgment notwithstanding the verdict. *Id.*

(a) Appellants contend the evidence adduced was insufficient to support the jury's finding that they breached the fiduciary duty owed Flags and Fund. We disagree.

Fiduciary duties and obligations are owed by those in confidential relationships, that is, relationships "where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners, principal and agent, etc." OCGA § 23-2-58. See *Atlanta Market Center Mgmt. Co. v. McLane*, 269 Ga. 604, 606(1), 503 S.E.2d 278 (1998). Appellants admitted and the evidence shows that SFOG was a general partner with such fiduciary duties. Moreover, as for the reasons set forth in Division 1(b), TWE, SFTP, and SFEC were also liable for any breach of SFOG's fiduciary duty.

We conclude that the evidence, viewed in the light most favorable to the jury's verdict, showed that appellants engaged in self-dealing conduct that specifically harmed appellees. For example, appellants kept secret profits derived from the sale of a partnership asset, the exclusive right to sell Coca-Cola products in the park. This was a breach of fiduciary duty. See *Franco v. Stein Steel & Supply Co.*, 227 Ga. 92, 95(1), 179 S.E.2d 88 (1970); see also OCGA § 14-8-21 ("Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from . . . any use by him of its property."). There was also evidence which could support the conclusion that the general partner engaged in self-dealing by depressing the value of the park by under-investing in it and then withholding information so that it could acquire the park at a discount. This was also a breach of fiduciary duty. See *Ledbetter v. Ledbetter*, 222 Ga.App. 858,

861(1), 476 S.E.2d 626 (1996); see 59A AmJur2d, Partnerships, § 443. Because the evidence supports the jury's verdict, we will not disturb it.

(b) Appellants contend the trial court should have directed a verdict in favor of "non-partner defendants" SFTP, SFEC, and TWE because only the subsidiary SFOG, as the named general partner corporate entity, owed Fund and Flags a fiduciary duty. We cannot agree.

Appellants' argument is founded upon the premise that appellees failed to adduce evidence imputing liability to TWE, SFTP, and SFEC, the parent corporations, for subsidiary SFOG's acts under alter ego, agency, or joint venture theories. However, whether the parent corporations were vicariously liable under any of these theories for SFOG's acts was not the main basis of liability argued below. Rather, the appellees argued at trial, as they do now on appeal, that the parent corporations aided and abetted SFOG in a breach of its fiduciary duties.

Although this court has never explicitly recognized a cause of action for aiding and abetting a breach of fiduciary duty, see *Munford v. Valuation Research Corp.*, 98 F.3d 604, 613 (11th Cir. 1996), we have at least twice implicitly acknowledged that such claims are viable. See *Williams v. Svc. Corp.*, 218 Ga.App. 10, 459 S.E.2d 621 (1995), and *U3S Corp. v. Parker*, 202 Ga.App. 374, 380(4), 414 S.E.2d 513 (1991) ("issues remain to be tried" on the count alleging two defendants "aided and abetted the other two defendants' breach of fiduciary duty"). We have explicitly "acknowledged an aiding and abetting cause of action in torts involving violence, the sale of unregistered securities, breaches of covenants with employment contracts, and fraudulent conveyances." *Munford v. Valuation Research Corp.*, 98 F.3d at 613. And, we have also recognized an aiding and abetting cause of action in many

cases involving the misapplication of trust funds. See, e.g., *Adams v. McGehee*, 211 Ga. 498, 500(4), 86 S.E.2d 525 (1955). Further, other jurisdictions have specifically found that such a cause of action is implicit in their existing case law governing the liability of persons acting in concert. See, e.g., *Granewich v. Harding*, 329 Or. 47, 54-58, 985 P.2d 788 (1999); *Holmes v. Young*, 885 P.2d 305 (Colo. App. 1994). Were we required to address this issue, we could follow suit, finding that such a basis for liability is implicit in OCGA § 51-12-30, pertaining to the joint liability of one who procures an actionable wrong. However, because appellants conceded an aiding and abetting theory of liability for breach of fiduciary duty claims at trial, error, if any, was induced. Moreover, because appellants have not enumerated as error the jury's finding of liability on this theory, we lack jurisdiction to consider it.

Appellants' Request to Charge No. 39, entitled "Liability of Other Defendants," specifically contained as one of three alternate bases of liability that "Defendant SFOG, Inc. was substantially aided by another Defendant[.]" Further, after the trial court charged the jury with respect to one who "aids or assists" in a breach of fiduciary duties, appellants' counsel failed to except to the charge on the ground that Georgia law does not recognize a claim for aiding a breach of fiduciary duties. Instead, counsel complained only that the trial court did not insert the word "substantially" before "aids." Appellants have not enumerated the giving of this charge as error or the jury's finding of liability on this basis as error.

"It is well settled that a party cannot complain of an appellate ruling, order, or judgment that his own legal strategy, litigative procedure, or conduct aided in causing." (Citations omitted.) *Strong v. Wachovia Bank*,

215 Ga.App. 572, 573(2), 451 S.E.2d 524 (1994). Moreover, this court lacks jurisdiction to consider inadequately enumerated grounds. OCGA § 5-6-40; *Meeks v. State*, 178 Ga.App. 9, 14(4), 341 S.E.2d 880 (1986). Consequently, we will not address the validity of this basis for liability, but note only that if we did, the evidence adduced supports the jury's finding that appellants aided and abetted SFOG in a breach of fiduciary duty to Flags and Fund. See *Holmes v. Young*, 885 P.2d at 309.

(c) Appellants also contend the trial court erred in denying their motion for judgment n.o.v. on appellees' "capital improvements claims." Appellants argue that because the "Capital Improvements" provision of the Partnership Agreement required the general partner to spend at least $800,000 per year on capital improvements, and because appellants spent well in excess of that, they satisfied their capital improvement obligations to the partnership and the limited partner and consequently cannot be held liable for breaching their fiduciary duty to make capital improvements. See *Westminster Properties, Inc. v. Atlanta Assoc.*, 250 Ga. 841, 842-843(1), 301 S.E.2d 636 (1983).

Addressing these contentions required that the partnership agreement be construed to determine the general partner's obligations with respect to making capital improvements. In this case, the trial court submitted the partnership agreement to the jury without construing it.[4] Although the court has a duty to construe contracts submitted to it, a new trial will not be granted where the contract is submitted to the jury and properly construed by it. *South Ga. Trust Co. v. Neal*, 174 Ga. 24(2), 161 S.E.

---

[4] Appellants argued they met their capital improvement obligations under the partnership agreement in a motion for summary judgment, in their trial brief, in their motion for directed verdict, and their motion for judgment n.o.v. The court denied the motions without opinion.

815 (1932). As explained below, we find that the partnership agreement required the general partner to make discretionary decisions in good faith as to the amount and type of capital improvements, and that there was evidence sufficient to support the conclusion that the general partner breached a duty to act in good faith in making these decisions. Because the jury verdict was consistent with this construction of the partnership agreement and with a finding that the general partner in concert with the other appellants acted in bad faith, we find no error.

"An issue of contract construction is at the outset a question of law for the court." *Grier v. Brogdon*, 234 Ga.App. 79, 80(2), 505 S.E.2d 512 (1998). The first step is to look to the four corners of the instrument to determine the meaning of the agreement from the language employed. *Terry v. State Farm &c. Ins. Co.*, 269 Ga. 777, 778-779(2), 504 S.E.2d 194 (1998). If the contract language is ambiguous, however, then the court must apply the applicable rules of construction. *Grier v. Brogdon*, 234 Ga.App. at 80, 505 S.E.2d 512; OCGA § 13-2-2. "The cardinal rule of contract construction is to ascertain the intention of the parties." (Punctuation omitted.) *Amstadter v. Liberty Healthcare Corp.*, 233 Ga. App. 240, 242(1), 503 S.E.2d 877 (1998); OCGA § 13-2-3. If, after applying the rules of construction, the language remains ambiguous, then the finder of fact must resolve the ambiguity. See id.

The contract provision at issue sets a capital improvements "minimum," a floor beneath which spending on capital improvements for any calendar year cannot fall.[5]

---

[5] The Partnership Agreement provides:

5. *Capital Improvements*. The General Partner, regardless of whether or not any Capital Improvement Funds have been set

"Minimum" here means "the least quantity, amount." Random House Dictionary of the English Language (1980), p. 571. It does not mean "only," which means "solely," or "exclusively." *See L & B Constr. Co. v. Ragan Enterprises*, 267 Ga. 809, 813, 482 S.E.2d 279 (1997). Consequently, this provision means that the general partner must make *at least* $800,000 in capital improvements in a calendar year and not *only* $800,000 per calendar year. The provision does not state that the general partner cannot or should not cause more to be invested. Further, the "carry forward" portion of the provision only lowers or eliminates the annual minimum capital improvements requirements for up to two years under certain conditions. It does not set what the general partner should invest in the park in any given year.

Salkin testified that this particular contract provision was added in the early 1970s because the general partner at the time was on the verge of bankruptcy and the partnership was concerned "that the park be maintained appropriately." The contract provision was intended to require the general partner to invest "separate and apart from the partnership" at least $800,000 of its own money

---

aside for the calendar year, will cause the limited partnership in each calendar year beginning on or after January 1, 1971, to install and construct minimum Capital Improvements in the Amusement Park in an amount equal to the lesser of 10% of the Proceeds for the immediately proceeding calendar year (after deducting therefrom the amount of any sums loaned to the limited partnership during such immediately preceding calendar year) or $800,000; provided that, if Capital Improvements actually made during any calendar year exceed the minimum amount herein specified, the excess difference between such minimum amount and the amounts actually expended may be carried forward for two subsequent years as a credit against the obligation of the General Partner to make such minimum Capital Improvements.

in improvements. This provision "had nothing to do with whether the partnership, what [the] partnership would bill[,] but if the partnership didn't have enough money, the general partner would at least put in that [$800,000] as a loan so that the park could be maintained at that time."

Although the partnership agreement does not specify in dollars what the general partner should cause to be invested in the park each year, it gives the general partner exclusive control over the management of the park and the right to set aside and spend capital improvement funds from the gross revenues generated by the park as are necessary to advance the purposes of the partnership. The agreement provides that these purposes include repairing, maintaining, improving, and operating the park, and conducting amusement activities for family entertainment. Nothing in the agreement evinces an intent to give the general partner absolute or uncontrolled discretion as to the amount to be spent on capital improvements or the type of capital improvements to be made. Rather, it may be fairly implied from the agreement as a whole that the general partner was required to exercise discretionary judgment in these matters in good faith.

Where an agreement gives a party discretionary decision-making power, and such power is not left to the absolute or uncontrolled discretion of the party, the discretion is subject to an implied obligation that it be exercised in good faith. *MacDougald Constr. Co. v. State Hwy. Dept.*, 125 Ga.App. 591, 594, 188 S.E.2d 405 (1972); *Automatic Sprinkler Corp. &c. v. Anderson*, 243 Ga. 867, 868-869, 257 S.E.2d 283 (1979). Furthermore,

> Laws in existence at the time a contract is executed are part of that contract. Already in existence at the time the partnership in question here was created was the provision in OCGA § 23-2-58 that partners owe a

> duty to act in the "utmost good faith" with regard to each other.

(Citation and punctuation omitted.) *Wilensky v. Blalock*, 262 Ga. 95, 98(3), 414 S.E.2d 1 (1992). Therefore it follows that the partnership agreement at issue here included, as a matter of law, that the general and limited partner had a fiduciary duty to act in utmost good faith toward each other. Id. Because the capital expenditures provision, construed in context, did not expressly give appellants the right to limit capital expenditures to only $800,000 per year, it did not relieve the general partner's duty to act in the utmost good faith. Id. See also *Southern Business Machines v. Northwest Financial Leasing*, 194 Ga.App. 253, 256(2), 390 S.E.2d 402 (1990).

Moreover, the evidence shows that appellants never interpreted the capital expenditures provision to mean they only had to invest $800,000 per year. TWE executive Daly testified that appellants knew they had a duty to maximize the performance of the partnership parks. Although appellants presented evidence that they exceeded the $800,000 yearly minimum by spending $23.8 million in capital investments in the Georgia park during the seven-year tenure of the general partner, whether the amount and type of capital investments which were made satisfied the fiduciary duty to act in good faith was a question of fact for the jury under the circumstances of this case. *MacDougald Constr. Co. v. State Hwy. Dept.*, 125 Ga.App. at 594, 188 S.E.2d 405.

The partnership agreement required that the general partner perform its managerial responsibilities by determining in good faith the amount of yearly capital improvements to be made in excess of the $800,000 minimum, if any, and how the funds for capital improvement were to be spent. Evidence was presented

that during its seven-year tenure the general partner either delayed or failed to make capital improvements in major thrill rides, which were the most important type of capital investment in terms of maintaining and improving the park's profitability and value. In conjunction with this evidence, additional evidence was presented from which the jury could conclude that the general partner exercised its discretion in these areas, not in good faith, but as part of a plan to under-invest in the park to suppress its value so that appellants could buy the park for a reduced price. Although the general partner presented evidence that it acted in good faith under the terms of the agreement, there was evidence to support a contrary conclusion that the general partner, in concert with the other appellants, acted in bad faith in violation of responsibilities under the agreement and fiduciary obligations to the partnership, by failing to make the amount or type of capital improvements which would have maintained and improved the profitability and value of the park.

Because the jury's verdict is consistent with this view of the evidence, we find no error.

2. (a) Appellants argue the trial court erred in charging the jury as follows:

> Should you find that one or more of the defendants breached any fiduciary duties to the plaintiffs, if you find that the defendants acted in good faith and in a manner that was consistent with the contractual obligations and its fiduciary duty under the general partnership law when taking such actions, you must find for the defendants.

Appellants contend the charge is contradictory. The charge is taken from Defendant's Request to Charge 34. During the charge conference, the court, with assistance from defense counsel, edited the charge by deleting the

paragraphs which came before and after the portion of the charge actually given. And, with the input of counsel, the court added certain phrases until the instant charge was crafted. After the entire charge was read to the jury, defense counsel excepted, objecting only to the court's addition of the phrase "and its fiduciary duty under the general partnership law" because that was "redundant and inconsistent and makes the charge confusing." However that phrase was, in substance, the very phrase appellant's counsel suggested adding. Error in the charge, if any, was self-induced and cannot be complained of on appeal. *Hancock v. Bryan County Bd. of Ed.*, 240 Ga. App. 622, 623(2), 522 S.E.2d 661 (1999); *Levin v. State*, 222 Ga.App. 123, 125(3), 473 S.E.2d 582 (1996). More-over, "where an entirely different objection is argued in a brief, as here, than was asserted at trial, we will not consider it." *Beck v. State*, 235 Ga.App. 707, 709-710(3), 510 S.E.2d 368 (1998). Finally, appellants never contended at trial, by objection or otherwise, that the charge was an incorrect statement of the law. The objection voiced was not sufficiently specific to apprise the court of error pursuant to OCGA § 5-5-24. Accordingly, any claim of error was waived. *Hancock v. Bryan County Bd. of Ed.*, 240 Ga.App. at 625-626(7), 522 S.E.2d 661.

(b) Appellants also contend that a paragraph from the trial court's 13-page instruction on fiduciary duty contained an allegedly burden-shifting charge. However, appellants have not shown that a proper exception to the charge was made and we find no such exception in our review of the record. Error, if any, was not preserved for our review. *Johnson v. Bruno's, Inc.*, 219 Ga.App. 164, 166(4), 464 S.E.2d 259 (1995). Further, appellants have not argued, nor has our review of the charge revealed, that a "substantial error" within the meaning of OCGA § 5-5-24 (c) was committed.

3. Appellants assert in four separate enumerations and throughout their brief that the trial court made numerous evidentiary errors that "hopelessly infected" the trial. To the extent appellants make a cumulative error argument, we reject it. See *Laney v. State*, 271 Ga. 194, 198(11), 515 S.E.2d 610 (1999). The decision to admit or exclude evidence lies in the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. See *Dept. of Transp. v. Mendel*, 237 Ga.App. 900, 902(2), 517 S.E.2d 365 (1999).

(a) (i) Appellants contend the trial court erred in granting appellee's motion in limine to exclude: (1) evidence that Flags was created as a tax shelter, and (2) evidence of the tax consequences to Fund and its investors if the general partner caused more than $800,000 per year to be spent on capital improvements. Appellants argue that this evidence was critical to its defense that the general partnership made only moderate capital improvements in order to generate "tax losses," which was, according to their interpretation of the partnership agreement, what Fund and its investors actually wanted. Appellants overstate the substance of the court's ruling.

The court, adopting the recommendation of the special master, agreed that certain defense themes were irrelevant and prejudicial. Specifically, the appellants were instructed not to inquire into Fund's *individual investors'* wealth, motives for investing, including any tax consequences to them, or on their return on investment. And, appellants were not permitted to inquire into Fund's return on investment, including any tax benefits, *prior to* the time appellants assumed responsibility for managing the park. Appellants were allowed to, and did, cross-examine Salkin on the tax consequences to Fund of capital investments in the park and presented their own expert

testimony covering those points. We see no evidence that appellants were prohibited from making the argument they now advance. Rather, it appears appellants made a strategic decision to argue that the general partner invested much more in the Georgia park than it was obligated to under the partnership agreement because that defense theme was more consistent with the evidence actually adduced from appellants' own witnesses. For example, Bob Pittman testified that he understood the partnership agreement required "some minimum amount" of annual capital investment, however, "every year we greatly exceeded that amount and we weren't even close to being near the minimum." Because appellants were able to present the evidence they contend was excluded, they have failed to show how they were harmed by the court's ruling. Consequently, appellants have not shown reversible error. See, e.g., *Cantrell v. Northeast Ga. Med. Center*, 235 Ga.App. 365, 371-372(6), 508 S.E.2d 716 (1998) (harm as well as error must be proven).

(ii) The trial court properly excluded a document Fund's lawyers filed with the California Department of Corporations. That document, which contained statements about the return on Fund's investment in the Six Flags theme park and the success of the investment over its lifetime, was not indicative of appellants' performance as general partner and was of dubious relevance to the issues at trial. We see no abuse of discretion. See *Kicklighter v. Woodward*, 267 Ga. 157, 161(4), 476 S.E.2d 248 (1996). Moreover, in light of the fact that appellants established how much Fund originally invested in the Georgia park, how much the park sold for in 1997, and how much Fund received in free cash flow both before and during appellants' tenure as general partner, we do not believe appellants were harmed by the exclusion of this document.

See *Cantrell v. Northeast Ga. Med. Center*, 235 Ga.App. at 371-372(6), 508 S.E.2d 716.

(iii) The trial court properly excluded "a calculation" pertaining to the value of the new partnership agreement made by Salkin's son, Kenneth. Because the younger Salkin, a college student, did not have the education, training, or experience necessary to give a theme park valuation, the trial court did not abuse its discretion in excluding his calculations. See OCGA § 24-9-67; *Martin v. Baldwin*, 215 Ga. 293, 297(2)(c), 110 S.E.2d 344 (1959).

(iv) Appellants contend the trial court erred in excluding "an admission" by a Fund attorney that the Fund's new general partnership agreement with TWE was a "grand slam plus." The statement was not "excluded"; rather, the trial court denied appellants' motion to compel a document in which the statement was allegedly made on the ground that the document was privileged. Pretermitting whether the document was erroneously withheld, the transcript reveals that appellants, through TWE executive Ross, were able to show that the same Fund attorney admittedly believed "that the Fund had gotten a very, very rich deal." Because appellants have failed to show they were harmed by the exclusion of the complained-of statement, we find no error. *Cantrell v. Northeast Ga. Med. Center*, 235 Ga.App. at 371-372(6), 508 S.E.2d 716.

(b) On November 17, 1998, the first day of trial, the judge entered an order which prohibited appellants from offering evidence tracing the flow of the $20 million Coca-Cola sponsorship fee as a sanction for discovery abuse. Appellants contend this was an unwarranted, or at least disproportionate, sanction. Appellants' arguments are not supported by the record.

On November 10, 1998, the trial court, adopting the Special Master's November 6, 1998 findings and recom-

mendation with respect to this discovery dispute, found that appellants "willfully attempted to obstruct, in violation of court orders," appellees' efforts to obtain the identities of and to take the depositions of witnesses who were knowledgeable about the flow of the Coca-Cola funds in connection with the recapitalization of SFTP and the closing of the stock purchase. The court found that appellants, instead of identifying or producing a witness for deposition, simply suggested that the person or persons sought were either employed with Chase Manhattan Bank or the firm of Lazard Freres; appellants stated they intended to "subpoena someone from Chase Manhattan Bank next week" and invited appellees to attend the deposition, once it was scheduled. Finding this effort at compliance inadequate, and in light of appellants' prior attempts "to obstruct discovery," the court ordered that the unnamed Chase Manhattan Bank witness would not be deposed until appellants specifically identified those persons most knowledgeable about the issues specified in appellees' OCGA § 9-11-30(b)(1) notice. The court further ordered appellants to produce instanter those bank records which appellees had requested and identified by specific account number well over a year before, records which had been ruled discoverable and which should have been produced by February 28, 1998. Appellants were warned that failure to comply with the court's order would result in their being precluded from offering evidence on this issue.

On November 12, 1998, appellants wrote appellees and offered as a deponent a lawyer who had been involved in the SFTP stock purchase, but who had "no relevant documents in his possession." Moreover, this person was not available to be deposed until November 15, 1998, two days before trial. Most significantly, however, appellants failed to produce the requested bank records, arguing "there are no documents at Time Warner. There are no

documents apparently at Chemical or Chase. They have been destroyed either in the ordinary course of business or through other reasons." Appellees did not depose the offered witness since doing so without the requested documents would be futile. After a hearing on appellees' motion for sanctions, the trial court found that appellants "willfully obstructed and failed to comply with the Court's Order of November 10, 1998" and, as the court had warned it would do, precluded appellants from offering evidence on the flow of the Coca-Cola sponsorship fee funds.

Trial courts have broad discretion to control discovery, including the imposition of sanctions. *Daniel v. Corporate Property Investors*, 234 Ga.App. 148, 505 S.E.2d 576 (1998). Absent a showing of a clear abuse of discretion, a court's exercise of that broad discretion will not be reversed. *Id.* Pretermitting whether appellants identified a deponent responsive to the OCGA § 9-11-30(b)(1) request and therefore made a good faith effort to comply with that part of the court's order, it is clear to us that such a deposition, without reference to the requested documents, would have been of little value. More importantly, though, it plainly does not satisfy the court's express order to produce the requested records. Appellants previously produced bank records, including a "boxful" of bank records on one account, and yet they could not locate these particular records and offered no credible reason for that failure. In fact, the judge could infer from the documents and arguments presented at the hearing that appellants did not undertake a timely or thorough search for the requested records they claimed were destroyed even though they had had over a year to do so. That conclusion was justified when two weeks into trial, some of the requested records were inexplicably found and produced.

OCGA § 9-11-37(b)(2)(B) specifically authorizes the court to prohibit a disobedient party from "introducing designated matters in evidence." Given the court's findings, which are supported by the evidence, we cannot say this sanction was unwarranted or disproportionate. See *Heyde v. Xtraman, Inc.*, 199 Ga.App. 303, 308, 404 S.E.2d 607 (1991). We find no abuse of discretion. See *Tompkins v. McMickle*, 172 Ga.App. 62, 64(2), 321 S.E.2d 797 (1984).

(c) Appellants argue the trial court erred in allowing appellee to present evidence of "unrelated claims" or "unrelated bad acts," for example, that appellants withheld financial projections or planned to build a competing theme park. Pretermitting whether this evidence can be labeled "unrelated" in a suit alleging an intentional breach of fiduciary duties and of the partnership agreement's implied duties of good faith and fair dealing, appellants did not object to any of this evidence when it was offered. Error, if any, was not preserved for our review. See *MARTA v. Green Intl.*, 235 Ga.App. 419, 425-426(3)(b), 509 S.E.2d 674 (1998); see also *Frostgate Warehouses v. Cole*, 244 Ga. 782, 783, 262 S.E.2d 98 (1979).

Moreover, even if this evidence could be considered similar transaction evidence, it would be relevant to show appellants' motive, intent, or bent of mind. *Troncalli v. Jones*, 237 Ga.App. 10, 15-16(4), 514 S.E.2d 478 (1999). Appellees requested that a limiting instruction on similar transaction evidence be given, but appellants successfully objected to it and did not request one of its own. Appellants may not now complain that the trial court granted its request. See *Bone v. State*, 178 Ga.App. 802, 806, 345 S.E.2d 46 (1986).

(d) Appellants argue the trial court erred in admitting improper testimony from Salkin. Appellants cite to 17

excerpts from Salkin's testimony, arguing that he was allowed to give evidence that was either outside his personal knowledge or which constituted a legal opinion. We have reviewed those excerpts which were accompanied by specific and timely objection and find that Salkin's answers were based upon his personal knowledge and that he gave no improper opinion testimony or testimony which invaded the province of the jury. See OCGA § 24-9-65; *Ivy Inn v. MARTA*, 175 Ga.App. 580, 584(4), 334 S.E.2d 319 (1985). Further, any error was rendered harmless by the trial court's instruction to the jury that the credibility of witnesses and the weight of the evidence were for their determination. See *Phelps v. Huff*, 214 Ga.App. 398, 403(2)(b), 448 S.E.2d 64 (1994).

4. Appellants contend the trial court made statements in front of the jury which impermissibly impugned the credibility of defense witnesses. Of the eleven record citations referenced in appellants' brief, nine were the court's instructions to witnesses to answer counsel's questions with a "yes" or a "no" before giving an explanation. One statement was a reminder that the court must give permission before a witness is allowed to leave the witness stand. Appellants objected to none of these statements.

The only statement to which appellants interposed an objection was a statement made by the court that the jury "take notice of the fact" that testimony given by Bob Pittman was "evasive." The court interrupted the cross-examination of Pittman at a point where Pittman responded to a question asking if a purchase by a company named Boston Ventures of 51 percent of what TWE owned in a Six Flags organization had triggered his receipt of a sum of money pursuant to a contract. Pittman responded that his receipt of the money was "technically" not triggered by the purchase made by Boston Ventures because, "It could have

been anybody buying it would have triggered the contract," and therefore "It was not Boston Ventures that triggered it." The court interrupted at that point and began to question Pittman.

> THE COURT: Mr. Pittman, I usually just kind of sit over here and don't say much. The last colloquy that I heard went something like this, did Boston Ventures trigger your contract, you getting whatever you got, and you said technically, no, it could have been anybody; but it wasn't anybody. It was Boston Ventures, right?
>
> PITTMAN: That's correct.
>
> THE COURT: If it was Boston Ventures and if I know how to read and write, then who triggered your contract?
>
> PITTMAN: Boston Ventures.
>
> THE COURT: Amen. I'm going to give you another piece of advice. I want simple answers that an old Boy from Georgia can understand. I don't want anymore of this. Now, you know better than that. That, to me, is double-talk and you would not want me to be upset with you, trust me. Now, answer his question and I want you to answer it right the next time.
>
> PITTMAN: Yes sir.
>
> THE COURT: I'm going to ask the jury to take notice of the fact that this witness was evasive.

First, we conclude that the objected-to comment by the court was not an expression of opinion as to what facts had or had not been proved, therefore no reversal is required under OCGA § 9-10-7. Rather, the court expressed its opinion that the witness was not responding to the question

being asked and was being evasive. *Walker v. Bishop*, 169 Ga.App. 236, 242, 312 S.E.2d 349 (1983); *Simmons v. State*, 138 Ga. 137, 74 S.E. 1000 (1912). Moreover, we do not believe the court's statement commented on the credibility of the witness. Compare *Griffin v. State*, 142 Ga.App. 362, 363-364, 235 S.E.2d 724 (1977), vacated on other grounds, 240 Ga. 470, 241 S.E.2d 230 (1978); *Speagle v. Nationwide &c. Ins. Co.*, 138 Ga.App. 384, 385, 226 S.E.2d 459 (1976); *Carver v. Leach*, 53 Ga.App. 112, 115, 185 S.E. 155 (1936), in which we concluded that the courts' improper comments on the credibility of the witnesses in those cases required reversal. In *Griffin*, the court made statements which implied or expressed that the witness was lying. In *Speagle*, the court's statements that the witness was "equivocating" and "has changed her testimony once or twice" expressed an opinion that the witness was not being truthful. In *Carver*, the court not only stated that the witness was evading the questions but made additional statements implying that the witness knew the truth and was not telling it.

Although the foregoing cases, and particularly *Carver*, present a close question as to whether the court commented on Pittman's credibility, we conclude that the court's comment, taken in context, was not directed at Pittman's overall credibility as a witness, nor did it imply that Pittman was being untruthful. The court expressed its opinion that Pittman was being evasive by not responding directly to the particular question. See *Saladine v. State*, 169 Ga.App. 425, 313 S.E.2d 714 (1984). Accordingly, reversal is not required on the basis that the court expressed an opinion as to the credibility of the witness.

Although it was within the power of the court to exercise control over the witness to prevent unresponsive or evasive testimony, *Speagle v. Nationwide &c. Ins. Co.*,

138 Ga.App. 384, 226 S.E.2d 459, we nevertheless conclude that the objected-to statement made by the court to the jury was inappropriate and erroneous. See *Reed v. State*, 163 Ga. 206, 216, 135 S.E. 748 (1926). Under the circumstances, however, we find that the appellants have failed to demonstrate that the comment was harmful and requires reversal. Although Pittman was a key witness, the court's statement was limited in scope to a single response by Pittman on a minor point, and the statement did not disparage Pittman's credibility in general. Moreover, the court's final charge thoroughly and properly instructed the jury on witness credibility and informed the jury that nothing the court "did or said during the course of this trial" was intended to "intimate, hint or suggest to you which of the parties should prevail in this case." Under these circumstances, the error was harmless. *Reid v. Harbin Lumber Co.*, 172 Ga.App. 615, 619(2), 323 S.E.2d 845 (1984); see also *CSX Transp. v. Barnett*, 199 Ga. App. 611, 612(1), 405 S.E.2d 506 (1991) (both harm and error must be shown to warrant reversal).

5. (a) Appellants argue the evidence on the issue of compensatory damages was insufficient to allow the jury to calculate the amount of compensatory damages to Fund[6] within a reasonable degree of certainty. As we have held:

> As to damages, a jury must be able to calculate the amount of damages from the data furnished and it cannot be placed in a position where an allowance of loss is based on guesswork. A jury must be able to

---

[6] Although appellants state that a portion of the $48 million in damages awarded Flags was based on speculation, they fail to support that assertion, offering argument which is pertinent only to the award of damages to Fund. Consequently, we deem this enumeration of error, as it applies to Flags, abandoned. Court of Appeals Rule 27(c)(2).

> calculate loss with a reasonable certainty. The party claiming damages carries not only the burden of proving the damages, but also furnishing the jury with sufficient data to estimate the damages with reasonable certainty. It is not necessary, however, that the party on whom the burden thus rests should submit exact figures. The rule against the recovery of vague, speculative, or uncertain damages relates more especially to the uncertainty as to cause, rather than uncertainty as to the measure or extent of the damages. Mere difficulty in fixing their exact amount, where proximately flowing from the alleged injury, does not constitute a legal obstacle in the way of their allowance, when the amount of the recovery comes within that authorized with reasonable certainty by the legal evidence submitted.

(Citations and punctuation omitted.) *CSX Transp. v. West*, 240 Ga.App. 209, 212-213(4), 523 S.E.2d 63 (1999).

In this case, experts for both sides were able to establish the value of the new partnership agreement to Fund at between $286 million and $300 million. Using appellants' own internal documents, appellees also were able to show a plan to under-invest in and thereby depress the value of the Georgia park. The evidence adequately demonstrated that the Georgia park did not receive capital improvements or maintenance comparable to appellants' wholly owned parks. Moreover, appellants documents revealed how much they typically invested in their wholly owned parks, following a "major/minor" plan for adding new attractions, thereby establishing a model for comparison. Using these documents and other information, appellees' expert on theme parks was able to calculate—using the multiple of EBITDA formula common to the industry—what an investor would have been warranted in investing in the

Georgia park had it been managed and invested in the same manner as comparable parks during appellants' tenure as general partner. That warranted investment was estimated at between $442 million and $458 million. Based upon this information, appellees' accountant opined that, as a result of appellants' misconduct, Fund lost between $142 and $172 million on the new partnership deal. This evidence was sufficient to allow the jury to calculate damages to Fund caused by appellants with reasonable certainty. See *CSX Transp. v. West*, 240 Ga.App. at 212-213(4), 523 S.E.2d 63; *Intl. Indem. Co. v. Regional Employer Svc.*, 239 Ga.App. 420, 422-423(4), 520 S.E.2d 533 (1999).

(b) Appellants also argue the award of compensatory damages to Fund and Flags was excessive. As shown above, the $149 million award to Fund was well within the range of evidence; consequently, we will not disturb it. See *Crawford v. Presbyterian Home*, 216 Ga.App. 54, 56(5), 453 S.E.2d 480 (1994); see also *Whitley v. Ditta*, 209 Ga.App. 553, 554-555(2), 434 S.E.2d 108 (1993).

Appellees also presented evidence showing that Flags was charged $4.8 million in improper inter-company allocations, that it was overcharged by $1.3 million for the Viper roller coaster, and that it never received its $2.8 million share of the Coca-Cola sponsorship fee. Flags also lost between $12 million and $15 million in income attributable to the delay in installing Batman the Ride. And, appellees presented testimony that appellants used Flags' share of the Coca-Cola money to acquire an interest in SFTP, which was sold at a substantial profit. Appellees' accountant determined that Flags' share of that return on investment amounted to $26.3 million. Appellees' accountant opined Flags lost, as a result of appellants' misconduct, over $50 million. Because the $40.8 million awarded to Flags was within the range of evidence, we will not

disturb it. *See Crawford v. Presbyterian Home*, 216 Ga.App. at 56(5), 453 S.E.2d 480.

6. (a) Appellants argue punitive damages were not authorized by the evidence because appellees proved no aggravating or outrageous circumstances or fraud. Punitive damages, however, are awardable in tort actions in which the plaintiff proves by clear and convincing evidence that a defendant's actions demonstrated "willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." OCGA § 51-12-5.1(b).

Appellees presented evidence that TWE, SFTP, SFEC, and SFOG executives were aware of their fiduciary duty to appellees but consciously and intentionally disregarded that duty. As Bob Pittman tellingly stated, TWE was "not interested in being in the business of managing assets for others." Rather, it was in the business of putting together business deals that would profit the company. And, to accomplish that, the appellants withheld vital business information from Flags and Fund, undertook to compete with them, took money belonging to them, and carried out a plan to depress the value of their investment, the Six Flags Over Georgia Park. This evidence authorized the jury to find by clear and convincing evidence wilful misconduct that supported an award of punitive damages. We find no error. See *Elliott v. McDaniel*, 224 Ga.App. 848, 854(5), 483 S.E.2d 104 (1996), rev'd on other grounds, 269 Ga. 262, 497 S.E.2d 786 (1998); *Daniell v. Clein*, 206 Ga.App. 377, 383(3), 425 S.E.2d 344 (1992).

(b) Appellants argue that the trial court erred by failing to instruct the jury, "that the requisite separate finding that Defendants acted with 'specific intent to cause harm' [also] had to be proved by clear and convincing evidence." Ap-

pellants have cited no authority, and we have found none, requiring the court to give such a charge. The trial court properly charged the jury on the law pertinent to awarding punitive damages under OCGA § 51-12-5.1(b), including the requisite "clear and convincing evidence" burden of proof, and whether appellants acted with specific intent to cause harm. We find no error.

(c) Finally, appellants argue the punitive damages award was excessive under Georgia law.

"Punitive damages are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." (Citation and punctuation omitted.) *Southeastern Security Ins. Co. v. Hotle*, 222 Ga.App. 161, 164(1)(e), 473 S.E.2d 256 (1996); OCGA § 51-12-5.1(a). An award of punitive damages will not be disturbed on appeal unless it is "so excessive or inadequate as to shock the judicial conscience to the degree that a judgment entered thereon constitutes an error of law." (Citation and punctuation omitted.) *Wilson Welding Svc. v. Partee*, 234 Ga.App. 619, 620, 507 S.E.2d 168 (1998). The $257 million punitive damages award was roughly 1.3 times the $197 million in compensatory damages. Although we do not mechanically look to the ratio between general and punitive damages to resolve the question of excessiveness, that ratio is some evidence of whether the jury's award was infected by undue prejudice or bias. See *Southeastern Security Ins. Co. v. Hotle*, 222 Ga.App. 164(1)(e), 473 S.E.2d 256. Given a 1.3-to-1 ratio, we cannot say that the award was excessive as a matter of law. See *Hosp. Auth. of Gwinnett County v. Jones*, 261 Ga. 613, 614(1), 409 S.E.2d 501 (1991) (260-to-1 ratio upheld). We find no error.

Judgment affirmed.

ANDREWS, P. J., and RUFFIN, J., concur.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. 00A725

TIME WARNER ENTERTAINMENT COMPANY, L.P., ET AL.,
Applicants,

v.

SIX FLAGS OVER GEORGIA, L.L.C., ET AL.,

ORDER

UPON CONSIDERATION of the application of counsel for the applicants, the response thereto, and the reply,

IT IS ORDERED that the remittitur of the Court of Appeals of Georgia in case No. A00A0120, be stayed as to punitive damages pending the timely filing and disposition by this Court of a petition for a writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court or further order of the Court.

/s/ Anthony M. Kennedy

Associate Justice of the Supreme Court of the United States

Dated this 1st Day
of March, 2001

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. 001875

TIME WARNER ENTERTAINMENT COMPANY, L.P., ET AL.,
Petitioners,
v.
SIX FLAGS OVER GEORGIA, L.L.C., ET AL.,

ORDER

ON WRIT OF CERTIORARI to the Court of Appeals of Georgia.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court is vacated with costs, and the case is remanded to the Court of Appeals of Georgia for further consideration in light of *Cooper Industries, Inc. v. Leatherman Tool Group*, 532 U.S. 424 (2001).

IT IS FURTHER ORDERED that the petitioners Time Warner Entertainment Company, et al., recover Six Flags Over Georgia, et al., Three Hundred Dollars ($300.00) for costs herein expended.

October 1, 2001

Clerk's costs: $300.00

APPENDIX H

IN THE COURT OF APPEALS
STATE OF GEORGIA

TIME WARNER ENTERTAINMENT COMPANY, L.P., SIX FLAGS ENTERTAINMENT CORPORATION, SIX FLAGS THEME PARKS INC., AND SIX FLAGS OVER GEORGIA, INC.,

Appellants/Defendants,

-against-

SIX FLAGS OVER GEORGIA, LLC, SIX FLAGS FUND, LTD. (L.P.), AND GEORGE DEROY, as Trustee of the Six Flags Claims Trust,

Appellees/Plaintiffs.

Appeal No. A00A0120

BRIEF OF APPELLANTS

---

* * *

Statement of Facts

The Partnership and the Park. The Six Flags Over Georgia theme park was operated from 1968 to 1997 by a Georgia limited partnership called Six Flags Over Georgia, Ltd. The Limited Partner in the Partnership was Plaintiff Six Flags Fund, Ltd., which was led by a tax attorney from California named Avram Salkin. (11/20/98 Tr 67-68) The General Partner was Defendant Six Flags Over Georgia, Inc.

The partners negotiated and agreed upon terms to govern their relationship, and set forth those terms in a written partnership agreement (the "Agreement" or "PA"). (DX 88) The Limited Partner was a completely passive investor; the Agreement provided that "[t]he General Partner shall have the exclusive control of the management of the business and affairs of the limited partnership". (PA Art. VII, ¶ 1)

Upon the termination of the partnership in 1997, the Limited Partner was to receive outright ownership of the Park, with all of its rides and other assets. (PA Art. XII)

Capital Improvements. The Agreement defined the General Partner's obligation to make capital improvements:

> "The General Partner . . . will cause the limited partnership in each calendar year beginning on or after January 1, 1971, to install and construct minimum Capital Improvements in the Amusement Park in an amount equal to the lesser of 10% of the Proceeds for the immediately preceding calendar year . . . or $800,000; provided that, if Capital Improvements actually made during any calendar year exceed the minimum amount herein specified, the excess difference between such minimum amount and the amounts actually expended may be carried forward for two subsequent years as a credit against the obligation of the General Partner to make such minimum Capital Improvements."

(PA Art. VII, ¶ 5) In each of the years at issue, from 1992 through 1997, the General Partner made well over the required $800,000 in capital improvements. (11/24/98 Tr 138, 144) In fact, capital improvements during that six-year period totalled $28.2 million, or almost six times the General Partner's obligation (6 years x $800,000/year). (12/7/98 Tr 179-80; DX 422, 734)

In making capital improvements decisions, the Agreement gave the General Partner sole discretion over the selection of rides and other attractions. (PA Art. III(b))

Management of the Park. From December 1991, the General Partner was owned by Six Flags Theme Parks Inc. ("SFTP"). SFTP was owned by Six Flags Entertainment Corporation ("SFEC"), which at the relevant time was itself owned 49% by Time Warner Entertainment Company, L.P. ("TWE") and 51% by institutional investors. (Defendants SFTP, SFEC and TWE are the "Non-Partner Defendants".)

Under Robert Pittman, the CEO of SFEC from December 1991 to May 1995 (12/8/98 Tr 60-61), the Park tried to broaden its appeal by installing family attractions as well as thrill rides (like roller coasters). (12/8/98 Tr 85-87) This strategy was extremely successful, as the Park achieved record attendance and profit levels. (12/7/98 Tr 175-84)

The phenomenal performance of the Park under Defendants' management was reflected in the investment return to the Limited Partner's investors. Each of the 100 unit-holders made a single capital contribution of $31,700 (R 16110-19) and, in return, ultimately received more than $580,000 in cash distributions (much of which was tax-free) and an interest in a new partnership agreement that Plaintiffs' financial advisor valued at $300,000,000. (Id.; PX 1155; 11/24/98 Tr 159)

Until April 1995, the Limited Partner never—over the course of more than 25 years—made a single suggestion or demand regarding what capital improvements should be made. (11/24/98 Tr 190-92; 12/8/98 Tr 95-96) Consistent with the terms of the Agreement, the Limited Partner left those decisions to the General Partner and reaped the

financial rewards of the General Partner's successful efforts.

Negotiations over a New Partnership. From 1992 to 1994, Mr. Salkin, who acted for the Limited Partner, negotiated with Defendants over the form of a new business relationship to follow the termination of the existing Partnership at the end of 1997. Notably, during this period the Limited Partner consistently sought to *hold down* the level of capital improvements to avoid adverse tax consequences. For example, Mr. Salkin advised Mr. Pittman that the Limited Partner did "not want to become burdened with" high spending on capital improvements. (11/24/98 Tr 162-66; DX 437) And, when the parties reached a tentative agreement on a new 30-year partnership in December 1994, the Limited Partner sought a contractual *ceiling* on capital improvements. (11/24/98 Tr 176-78)

The Limited Partner Demands Installation of Batman the Ride. In April 1995, Mr. Pittman for the first time mentioned Batman the Ride to Mr. Salkin. (11/24/98 Tr 249-53; 12/8/98 Tr 118) Shortly afterward, the tentative new agreement fell apart. Seeking leverage in the ongoing negotiations, the Limited Partner then claimed it was the General Partner's fiduciary duty to install Batman the Ride, which cost over $9 million, for the 1996 season, just two years before the Limited Partner was to take over the Park.

Defendants told Mr. Salkin they had no legal duty to install Batman the Ride because the General Partner had far exceeded the capital improvements obligation in the Agreement each year. (12/8/98 Tr 264-65; 12/9/98 Tr 9-10) Also, the General Partner believed that installing the Batman ride in 1996 would be unwise because the Atlanta Olympic Games would divert attendance from the Park (as in fact they did, even more than expected), preventing the

Partnership from recouping an investment in the ride. (12/3/98 Tr 203-06; 12/9/98 Tr 5-7) Mr. Salkin "concurred" in the decision not to install Batman the Ride in 1996. (11/25/98 Tr 18-19; 12/9/98 Tr 13-16; DX 538)

Seeking further leverage, Mr. Salkin instructed his accountants to examine SFTP's financial records (11/30/98 Tr 71-73), to which Defendants gave full access (12/7/98 Tr 110-21). The Limited Partner then made claims of breach of fiduciary duty regarding (i) the handling of proceeds in 1991 from a nationwide Six Flags sponsorship agreement with Coca-Cola, (ii) the transfer of the "Viper" roller coaster from another SFTP theme park to the Park for the 1995 season, and (iii) charges, known as "intercompany allocations", for services SFTP provided to the Partnership.

The Auction. In 1996, the Limited Partner's financial advisor (the Wall Street investment bank Goldman Sachs) and its lawyers (the Los Angeles firm of Gibson, Dunn & Crutcher) held an auction among theme park companies for the right to manage the Park after the existing Partnership expired. As a condition to allowing Defendants even to take part in the auction, the Limited Partner demanded, among other things, that Batman the Ride be installed for the 1997 season. Defendants acceded to that, and the Limited Partner's other demands, to be permitted to bid. (11/25/98 Tr 27-28; 12/9/98 Tr 28-30; 12/10/98 Tr 12-14)

Defendants were the highest bidder, but the Limited Partner falsely told them there was a higher bid, thereby inducing Defendants to increase their bid by $30 million. (12/9/98 Tr 62-65, 113-17) The Limited Partner accepted that offer and entered into a new partnership with Defendants—a deal Plaintiffs characterized (in a document excluded by the court) as a "grand slam plus" (R 6308-09). However, the Limited Partner reserved the right to assert

claims against Defendants on behalf of itself and the Partnership.

Proceedings in the Trial Court

Faced with the Limited Partner's reservation of rights, and in the belief that judicial interpretation of the Agreement would resolve any potential claims, the General Partner and SFTP filed a declaratory judgment action in the Superior Court of Gwinnett County, where Plaintiff Six Flags Over Georgia, LLC was registered, on March 19, 1997. (R 6-12) The Limited Partner and the other Appellees here filed counterclaims and added SFEC and TWE as Defendants. (R 14-40, 41-77) Upon Plaintiffs' petition, the trial court realigned the parties. (R 14-40, 222-24) The General Partner moved for partial summary judgment because it had complied with its obligations under the Agreement, and the Non-Partner Defendants moved to dismiss all claims because they were not partners. (R 528-51, 556-99) The court denied both motions without opinion. (R 1330-33)

Before trial, Plaintiffs moved to exclude numerous items of evidence central to Defendants' case. (R 10500-900, 11061-67, 11240-369) The court referred those motions to a special master, despite Defendants' limited consent to a master for discovery disputes only. (R 5092-93) The court accepted the master's recommendation to grant *all* of Plaintiffs' *in limine* motions (R 15399-412, 15571-82), even though the master had issued the recommendations without even *reading* Defendants' briefs (R 15548-49). Plaintiffs also created a discovery dispute that led to the preclusion order relating to the sponsorship agreement. (R 16037-38)

The case was tried to a jury from November 17 through December 21, 1998. On the eve of trial and at the close of evidence, Plaintiffs abandoned their fraud, conspiracy to

breach contract and certain breach of contract claims. (R 13140-48, 15657, 16345; 12/16/98 Tr 81-86) Plaintiffs also announced that they were not asserting claims for various conduct pleaded in their complaint and pressed vigorously at trial. (R 228-59, 13144-48; 12/16/98 Tr 109-10) Defendants' motion for a directed verdict on the remaining claims was denied. (R 16248-314; 12/16/98 Tr 114-15) The claims submitted to the jury were: (i) the Limited Partner's claim for breach of fiduciary duty with respect to capital improvements and (ii) the Partnership's claims for breach of fiduciary duty (based on capital improvements, the Coca-Cola sponsorship contract, intercompany allocations and the Viper ride), conversion and breach of contract.

On December 18, 1998, the jury returned a verdict for Plaintiffs on their fiduciary duty claims, and awarded $197,296,000 in compensatory damages ($149,175,000 to the Limited Partner and $48,121,000 to the Partnership). (R 16384-89) After the punitive damages phase, on December 21, the jury awarded Plaintiffs $257,000,000 in punitive damages, of which three-quarters was awarded to the Limited Partner. (R 16391-94) Only $1 million of this punitive damages award was rendered against the General Partner; the rest was against the Non-Partner Defendants (including $245 million against TWE alone). The court entered final judgment that same day. (R 16395-98)

Defendants moved in a timely manner for judgment notwithstanding the verdict (JNOV) or, in the alternative, a new trial. (R 16443-48, 16507-622) On April 22, 1999, the trial court denied Defendants' motion. (R 18007-09)

Appellants preserved their enumerations of error by the following methods: motion for a directed verdict (R 16248-314), objections to the jury charge and submission of proposed jury changes (R 15660-766, 16094-109,

16120-52, 16153-74; 12/17/98 Tr 243-52; 12/21/98 Tr 169-71), oppositions to Plaintiffs' motions to preclude evidence or argument (R 13473-4190, 15632-47, 15863-910, 11/17/98 Tr 11-21), offers of proof (R 16062-69, 16110-19, 16217-30, 12/2/98 Tr 53-85), motion to compel production (R 6410-50), contemporaneous objection to trial errors (as noted *infra*), and motion for JNOV or new trial (R 16443-48, 16507-622)

* * *

Enumeration of Errors

1. The trial court erred by failing to grant Defendants judgment on Plaintiffs' capital improvements claim because the Partnership Agreement defined Defendants' obligation and specifically authorized their conduct.

2. The trial court erred by giving improper jury charges on breach of fiduciary duty and failing to give Defendants' proposed charges.

3. The trial court erred by failing to grant judgment in favor of the Non-Partner Defendants, which owed no fiduciary duty to Plaintiffs.

4. The trial court erred by excluding evidence critical to the defense.

5. The trial court erred by precluding Defendants from offering any evidence or argument on the Partnership's claim regarding the Coca-Cola sponsorship agreement.

6. The trial court erred by impugning the credibility of Defendants' witnesses in front of the jury.

7. The trial court erred by allowing the jury to consider prejudicial evidence of conduct unrelated to the claims submitted to the jury.

8. The trial court erred by permitting Plaintiffs to introduce improper testimony.

9. The trial court erred by failing to grant Defendants judgment because the evidence did not support Plaintiffs' fiduciary duty claims.

10. The trial court erred by failing to strike Plaintiffs' compensatory damages as speculative.

11. The trial court erred by failing to strike or reduce Plaintiffs' compensatory damages as excessive.

12. The trial court erred by failing to grant Defendants judgment on liability for punitive damages.

13. The trial court erred by failing to instruct the jury on the standard of proof for specific intent to harm.

14. The trial court erred by failing to strike or reduce Plaintiffs' punitive damages as excessive.

* * *

VII. THE TRIAL COURT ERRED BY FAILING TO SET ASIDE THE PUNITIVE DAMAGES AWARD.

A. *Defendants Are Entitled to Judgment on Liability for Punitive Damages.*

The jury awarded Plaintiffs over a quarter of a *billion* dollars in punitive damages—by far the largest award in Georgia history. As a matter of law, punitive damages are not authorized on these facts.

Section 51-12-5.1 of the Georgia Code provides that Plaintiffs had the burden of proving "by *clear and convincing evidence* that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences".

O.C.G.A. § 51-12-5.1(b) (emphasis added). Plaintiffs did *not* meet their burden. This case did not involve "circumstances of aggravation or outrage", *Tri-County Inv. Group, Ltd. v. Southern States, Inc.*, 231 Ga. App. 632, 638, 500 S.E.2d 22, 27-28 (1998), or fraud, *see Wilson Welding Serv. v. Partee*, 234 Ga. App. 619, 620, 507 S.E.2d 168, 170 (1998) (refusal to award punitive damages appropriate where there was no "significant amount of fraud"). Plaintiffs tacitly conceded as much by withdrawing their fraud claim before trial. (R 13140-48) No conceivable reading of the record can support a finding by clear and convincing evidence that Defendants' alleged misconduct rose to the requisite level for punitive damages.

B. *The Trial Court Failed to Instruct the Jury on the Standard of Proof for Specific Intent to Harm.*

The trial court also erred by failing to instruct the jury, as Defendants requested, that the requisite separate finding that Defendants acted with "specific intent to cause harm" had to be proved by clear and convincing evidence. (R 16379; 12/21/98 Tr 112) By statute, punitive damages are capped at $250,000 for each plaintiff unless the jury makes a separate finding of specific intent to harm. O.C.G.A. § 51-12-5.1(f), (g); *Bagley v. Shortt*, 261 Ga. 762, 763, 410 S.E.2d 738, 739 (1991). Because of the extraordinary nature of punitive damages, findings supporting punitive damages must meet the more rigorous clear-and-convincing standard of proof. O.C.G.A. § 51-12-5.1(b). The failure to instruct the jury on the standard of proof for the specific-intent finding was *per se* reversible error. *Hammett v. Reynolds*, 243 Ga. 669, 671-72, 256 S.E.2d 354, 356-57 (1979).

C. *The Punitive Damages Are Excessive.*

Finally, the $257 million punitive damages award is excessive and must be set aside or reduced. *See* O.C.G.A.

§ 51-12-12(a). This award is over *30* times larger than the largest punitive damages award ever paid in this state—the $8 million award where plaintiff's decedent was engulfed in a ball of fire caused by the defendant's knowing design of an automobile with an unsafe fuel system. *Ford Motor Co. v. Stubblefield*, 171 Ga. App. 331, 319 S.E.2d 470 (1984).

Here, the $257 million was awarded primarily because Defendants installed a roller coaster three years later than Plaintiffs wished. This award violates the Excessive Fines Clause of the Georgia Constitution because, as in *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 365 S.E.2d 827 (1988), there is no "sensible relation between punishment and offence". *Id.* at 119-20, 365 S.E.2d at 831. Notably, Defendants' conduct involved no "personal injury or death" (or even a *risk* of injury or death). *Id.* at 122, 365 S.E.2d at 833. The punitive damages also violate the Due Process Clauses of the Georgia and United States Constitutions. As in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the injury here "was purely economic in nature", and Defendants' conduct "evinced no indifference to or reckless disregard for the health and safety of others". *Id.* at 576.

* * *